(1)

88-35

NO. _____

Supreme Court, U.S.
FILED
JUN 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

Charles L. Feiss, PETITIONER,

v.

VETERANS ADMINISTRATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Charles L. Feiss
8321 New England Ave
Niles, Illinois 60648
(312) 966-6977

June 20, 1988

QUESTIONS PRESENTED FOR REVIEW

1. Whether rescission of an employment settlement agreement can be denied when mutual mistake during negotiation has been discovered and documented as a prima facie case, even prior to hearing by Merit Systems Protection Board?

2. Whether prior probationary service on same government job can be denied as being appplicable in order to refuse recognition of employee as having reached career status?

LIST OF PARTIES

The parties in the proceedings below were Petitioner, Charles L. Feiss, and Respondent, VETERANS ADMINISTRATION Data Processing Center, Hines, Illinois.

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FEDERAL STATUTES

FEDERAL PERSONNEL MANUAL

Chapter 315 Subchapter 8

and Appendix A thereto

5 C.F.R. Sec 1201

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES L. FEISS,

PETITIONER,

v.

VETERANS ADMINISTRATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, Charles L. Feiss, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Federal Circuit handed down on 12 April 1988.

OPINION BELOW

The Court of Appeals entered its decision affirming the denial of Petitioner's request for rescission of an employment settlement agreement contract. A copy of the decision is attached as Appendix A.

The Court issued its mandate on 3 May 1988, also attached in Appendix A.

JURISDICTION

The Court of Appeals included with the opinion of 12 April 1988, information indicating that Petitioner could pursue this matter in this Court in accordance with Title 28 USCA Rule 17.1/

1/ No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person... be deprived of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

On 21 November 1986 the Veterans Administration (hereinafter referred to as the respondent agency or VA) tendered a termination notice to Petitioner, such notice being later found to be statutorily defective. The VA offerred, just prior to the termination date of 5 December 1986, a settlement agreement contract to Petitioner, which Petitioner signed. The VA offerred the contract because Petitioner had initiated an administrative complaint which was looked on favorably by the resident EEO counselor

(Settlement Agreement attached Appendix B; EEO counselor report attached Appendix C).

The defect in the termination notice was "termination during probationary" service, which requires substantially less "evidence" than if it were accomplished under career service conditions, where, at minimum, Petitioner would have been allowed to respond to charges and have Union representation. The statutory completion of probationary service was accomplished prior to termination. (Appendix D attached is the termination letter; Appendix E attached is Chapter 315 Subchapter 8 of the Federal Personnel Manual - containing the statutory regulations.)

The settlement agreement contract required that Petitioner give up his right to the imminent two-grade increase promised

at time of hiring (known as career path) and accept a new one-year term of probationary service.

A hearing was held at Petitioner's request at the Chicago offices of the Merit Systems Protection Board, on 16 July 1987, wherein Petitioner pleaded mutual mistake or tortious fraud due to misrepresentation. The MSPB denied Petitioner's claim of contract fraud and dismissed the case for lack of jurisdiction (Opinion of MSPB attached as Appendix F).

Petitioner petitioned the Washington, DC MSPB review board on 10 August 1987 for review of the Chicago MSPB decision. This petition was denied on 27 November 1987 (Order attached as Appendix G). The appeal to the United States Court of Appeal for the Federal Circuit was filed 11 December 1987

and the opinion handed down 12 April 1988 (Appendix A.).

REASON FOR GRANTING WRIT

Petitioner feels that he has not received due process under the Constitution of the United States, Amendment V, in the matter at hand. Petitioner does **not** claim that he changed his mind after the contract was signed, but only that he would **not** have signed it had the agency respondent **not** issued the wrong date of removal and this incorrect date **had been known** to Petitioner. Petitioner relied on the respondent agency's mistake, in agreeing to the settlement contract; the MSPB and the Appeals Court find only that the contract contains no incorrect statements and therefore is all right. The opinions handed down do not

explain why Petitioner's arguments fail under test or even what tests may have been applied; Simmons v Evans Supreme Court of Tennessee, 1927. 185 Tenn. 282 S.W.2d 295. "...regardless of whether these facts were known by the first party or not it is the duty of the first party to be aware of any unusual conditions or circumstances relating to the contract and then to disclose them." (In this case, the Supreme Court of Tennessee held "...that 'one may be guilty of fraud by his silence, as where it is expressly incumbent upon him to speak concerning material matters that are entirely within his own knowledge.'") In Seneca Wire & Mfg. Co. v A.B. Leach & Co., Court of Appeals of New York, 1928. 247 N.Y. 1,159 N.E. 700. "It is not necessary, in order that a contract may be rescinded for

fraud or misrepresentation, that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient, and this rule applies to actions at law based upon rescission as well as to actions for rescission in equity....". In Estate of Jones v. C.I.R. 795 F.2nd 566, there is mutual mistake, wherein a federal agency prevails in overturning an agreement.

Certainly, Petitioner was acutely aware of the anniversary date of his hiring, especially since that date signaled the first of two career path employment grade increases (the settlement agreement only contained a single-step within-grade increase, with a new probationary period included, both of which were distasteful to Petitioner); but all doubt had left

Petitioner when the VA began negotiations utilizing the same information as in the termination letter (Appendix D), the "official" date of termination, and Petitioner saw no alternative but to sign the settlement contract in order to continue in his chosen field of endeavor, with the VA.

The MSPB made the observation in its opinion that the VA was giving Petitioner a second chance to perform at an acceptable level, by the offering of the settlement agreement, while ignoring Petitioner's position that the settlement agreement turned out to be a ruse to enable the VA to formulate an "evidence" file which it lacked, to make its case against Petitioner.

Petitioner notes that there is no claim by the MSPB or the Appeals Court or the

respondent that Petitioner's claim is frivolous.

Petitioner notes that in the cases he has found and cited on behalf of his arguments, all have been through one or more appeals process, and therefore it is not completely surprising that the positions taken by the MSPB and the Appeals Court have gone against Petitioner.

The MSPB overlooks the provisions for prior service counting toward fulfillment of a current period of probation. In the Federal Personnel Manual Chapter 315 Subchapter 8, 8-2 and Appendix A it can be seen that Petitioner fulfilled his probationary service either at the end of December 5, 1986 or the end of December 8, 1986, depending on the validity of the settlement agreement (Appendix H). Therefore

he should not have been dismissed as a probationary employee on May 15, 1987, regardless of the validity of the settlement agreement.

CONCLUSION

For the foregoing reasons, petitioner Charles L. Feiss respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

Dated 1988

Charles L. Feiss, pro se
8321 New England Avenue
Niles, Illinois 60648
Telephone (312) 966-6977

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Charles L. Feiss, Petitioner, v. Veterans Administration, Respondent.

APPENDIX	DESCRIPTION
A	5/12/88 Decision of U.S. Court of Appeals for the Federal Circuit
B	12/3/86 Settlement Agreement
C	4/24/87 Equal Employment Opportunity Counselor Report
D	11/3/86 Termination Letter
E	Federal Personnel Manual, Chapter 315, Subchapter 8, 8-4
F	7/31/87 MSPB Opinion
G	11/27/87 MSPB Review Board Appeal Rejection
H	Federal Personnel Manual, Chapter 315, Subchapter 8, 8-2, Appendix 315-A

Appendix A

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

88-3078

CHARLES L. FEISS,

Petitioner,

v.

VETERANS ADMINISTRATION,

Respondent.

Decided: April 12, 1988

Before RICH, NIES, and MAYER, Circuit Judges

Nies, Circuit Judge.

DECISION

Charles L. Feiss seeks review of the final decision of the Merit Systems Protection Board, Docket No. CH315H8710442,

dismissing his appeal of the Veterans Administration's removal decision for lack of jurisdiction. We affirm.

OPINION

Two days before Feiss was to be removed in December 1986, Feiss and the agency entered into a settlement agreement. That agreement reappointed Feiss to his position but required him "to complete a probationary period of one year commencing on December 7, 1986." The agency terminated Feiss's employment in May 1987. Feiss appeals from the second removal decision.

The only issue is whether a valid settlement agreement exists. If it does, the agency then removed Feiss during a probationary period from which action Feiss has no appeal rights, except on grounds not asserted here. See, e.g., Stokes v. Federal Aviation Admin., 761 F.2d 682, 684-85 (Fed. Cir. 1985). As the party attacking a

settlement agreement, Feiss bears a heavy burden of proving that the agreement is invalid either by fraud or mutual mistake. Callen v. Pennsylvania R.R. Co., 332 U.S. 625, 630 (1948); Asberry v. United States Postal Serv., 692 F.2d 1378, 1380 (Fed. Cir. 1982). Feiss has not met that burden. Thus, the board properly dismissed.

Feiss's arguments that "the agency and MSPB have steadfastly opposed [his] efforts to present evidence [on other issues]" and that the second termination notice improperly referred to Feiss's work during his first employment period are irrelevant.

We have considered each of Feiss's arguments. Under our statutorily prescribed scope of review, 5 U.S.C. Sec 7703(c) (1982), the board's final decision is affirmed.

United States Court of Appeals for the
Federal Circuit

88-3078

CHARLES L. FEISS,

Petitioner,

v.

VETERANS ADMINISTRATION,

Respondent.

Judgement

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). CH315H8710442

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

DATED APR 12 1988

ENTERED BY ORDER OF THE COURT

Francis X. Gindhaart, Clerk

ISSUED AS A MANDATE: MAY 3 1988

Appendix B

Equal Employment Opportunity Complaint

Charles Feiss
Complainant

vs.

VA Data Processing Center
Hines, IL
Respondent

Settlement Agreement

The parties and their representatives hereby stipulate and agree as follows:

1. This Settlement Agreement shall not be construed as an admission by the Respondent (Veterans Administration Data Processing Center, Hines, Illinois), its agents, servants and successions and each of them of any acts of discrimination, any unfair labor practice, any torts or any breach of contract against the Complaint (Charles Feiss) and the Respondent specifically disclaims any discrimination, whatsoever, against the Complainant on the part of

itself, its agents, servants, and successions and each of them.

2. The Respondent agrees to appoint the Complainant to a Computer Programer, GS-334-5, position in the Benefits Delivery Systems Division. The effective date of the appointment is December 7 1986. Mr. Feiss will be appointed as a GS-334-5 step 2 with an annual salary of $14,870 and the position is developmental to the GS-334-9 level. Mr. Feiss will be required to complete a new probationary period of one year commencing on December 7, 1986.

3. Complainant agrees to withdraw and does hereby withdraw with prejudice, and never to pursue in any form or manner, all charges, grievances and complaints which Complainant has filed with the VA and further agrees not to file additional charges of any kind with any federal governmental agency based on events occurring prior to the date of

execution of this Settlement Agreement.

4. Complainant further agrees not to file additional charges, complaints or procedings based on discrimination against the Veterans Administration or any person in anyway related to the Veterans Administration, with any court or judicial body based on events occurring prior to the date of execution of this Settlement Agreement.

5. The parties agree that this Settlement Agreement may be used as evidence in a subsequent proceeding in which any of the parties and their attorneys allege a breach of this Settlement Agreement.

6. This Settlement Agreement constitutes the complete understanding between the parties and their attorneys. No other promises or agreements shall be binding unless signed by their parties.

7. Both parties also stipulate that:

a. This agreement has been entered into

freely by both parties;

b. This agreement does not constitute an admission of guilt, fault or wrongdoing by either party;

c. This agreement shall be kept confidential and the terms herein shall not be disclosed by either party, except to authorized EEO officials or other officials responsible for implementing the agreement;

d. This agreement shall not serve as a precedent for resolving any other complaints, which have been or may be filed by the complainant or any other person; and

e. This agreement constitutes the entire agreement and there are no other terms to this agreement except those specified herein.

STIPULATED AND AGREED TO:

Charles Feiss Dec 3, 1986

James Rains, EEO Counselor 12-3-86

T. Jacobs for 12/4/86

P.ISING Deputy Chief, Benefits Director for ADP Systems Management VA Central Office Washington, DC

APPENDIX C

EEO COUNSELING REPORT April 24, 1987

Name of Person Counseled: Charles Feiss

Position Title and Grade: Computer Programer, GS-5

Organization Unit: Systems Development Section I (202D5A)

Date of Initial Interview: 03/06/87*

Name of EEO Counselor: James Rains

Basis of Complaint: Age: 64 (born 2-1-23); Reprisal

Issues: Mr. Feiss came to see me on 3/6/87 stating that he believed that the age discrimination he had seen me about before was continuing and that he was being made to suffer due to his prior EEO Complaint. That complaint had been filed 11/21/86 and resulted in a settlement agreement dated 12/03/86.

*Previous History:

Mr. Feiss originally came to see me on 11/21/86. He stated that he had started to

work here on 12/09/85 and that for the first 3 months he had been in training. He stated that he had finished the training at the top of his class and had been placed in Systems Development Section I under Ms. Bigane. He felt that he was doing fine in his job but that something had happened to make Ms. Bigane turn against him. He stated that he was to be fired just short of completion of his one year probationary period. He stated that he had worked under Ms. Bigane until October when he had been moved to a different group in SDS I.

I spoke to Ms. Bigane. She stated that Charles had come out of his training class highly recommended but had been a disappointment. She stated that he had problems with logic and that he always blamed others for these problems. She said that he often made the work more complex than was needed. She stated that at his last quarterly review (in August) he had argued with her and laughed. She said that he often argued with another section employee. She

stated that there seemed to be a personality conflict but that it appeared to go away in August. She made a point of telling me that she had not made the decision to fire him.

I reviewed Mr. Feiss' personnel file. It showed a bachelor's degree in Engineering and an additional 33 credit hours of college computer classes including Assembler. The GPA for these classes was 3.67. His last performance appraisal showed presumed fully satisfactory. I also reviewed the documentation file.

After reviewing this file I spoke to Mr. Jacobs, Chief, Benefits Delivery Systems Division. I explained to him that I would not want to have to defend the agency against suit brought by Mr. Feiss if I was armed only with the documentation file. I stated that it contained long diatribes by Ms. Bigane regarding Mr. Feiss' inability to get along with other people. There were inadaquacies noted but they were always in the third person. All in all it was not very objective and read like a personal attack.

Mr. Jacobs stated that all reports he had received had been glowing until suddenly Ms. Bigane stated that Mr. Feiss should be fired. When confronted with this suddeness she backed down and began the evidence file. He stated that he was not sure that the decision to fire Mr. Feiss was correct and proposed a solution. This solution took the form of a Settlement Agreement.

Current Complaint:

Mr. Feiss saw me on 3/06/87 and stated that he had had an evaluation meeting with Mr. Liberio, Unit Head, and Mr. Wozniak, Computer Programer Analyst, and had been told that his work did not meet the minimum requirements. He said that he felt he was doing fine. He stated that he was to have a follow up meeting with Ms. Papp, Personnel Management Specialist, and would like me to come along. I contacted Ms. Papp and she stated that my being there would be ok. During the meeting she stated that this was the second phase of a placement follow up

meeting and explained the procedures for such a follow up. She also stated that if no improvement was reported by Mr. Feiss' Section he would have to be terminated based on VA personnel regulations.

I subsequently spoke to Mr. Liberio and Mr. Baran, Chief, Systems Development Section I. They stated that they were concerned about Mr. Feiss' performance but did not seem to think the situation was as serious as Ms. Papp had indicated.

Finally I spoke with Mr. Jacobs. He stated that Mr. Feiss may be a little justifiably paranoid. We also discussed the Settlement Agreement. The confidentiality guareenteed in it was breeched on the first day of Mr. Feiss' new appointment. We talked about the decision for Mr. Feiss to be left in the same section (but different unit) for the new appointment. Mr. Jacobs agrees that there is the possibility of leftover hostility but feels that it is unwise to continue moving people from place to place every time there is any kind of problem.

APPENDIX D

VETERANS ADMINISTRATION

DATA PROCESSING CENTER

LOCK BOX 66303

AMF O'HARE, ILLINOIS 60666

November 21, 1986

201/38

FOR OFFICIAL USE ONLY

Mr. Charles Feiss

Benefits Delivery Systems Division

Systems Development Section I (202D5A)

Hines, IL 60141

SUBJ: Removal During Probationary Period

1. On December 8, 1985, you were given a Career-conditional Appointment as a computer programer, GS-334-5. This appointment is subject to satisfactory completion of a one (1) year probationary period.

2. During this period your performance has been subject to close review. Since the completion of the formal training you have not demonstrated the skills needed to function as an effective and productive computer programer. You have difficulty translating written specifications into executable code, determining test requirements to prove logic, and determining the cause of logic malfunctions although intensive individual help has been continuously provided. As a result, it has been determined to be in the best interest of the Data Processing Center to terminate your employment.

3. This termination will be effective close of business December 5, 1986.

4. You may appeal this decision through the Veterans Administration EEO complaints procedure if you believe this action was based on discrimination because of race,

color, religion, sex, age, physical handicap, or national origin. To begin such a complaint, you must contact a Center EEO Counselor not later than 30 days after the date of removal. The names and pictures of the counselors are posted on official center bulletin boards. If you believe this action was taken as a result of discrimination involving marital status or partisan political reasons, you may appeal to the Merit Systems Protection Board (MSPB), Chicago Region, Federal Office Building, 230 South Dearborn Street, Chicago, Illinois 60604. Your appeal must be in writing setting forth the facts and circumstances on which the appeal is based and must be sent no later than 20 calendar days after the date of removal. A copy of the MSPB regulations as they appeared in the Federal Register, and an appeal form are enclosed.

5. Any government property, which you have

such as keys or uniforms must be returned to us. If they are not, any monies which you have coming may be withheld until we receive them.

6. If there is any question regarding the reasons or circumstances bringing about this action or if you wish an additional explanation of your appeal rights, you may contact me at the Personnel Division, Room 103A, Building 215, telephone number 681-6680.

BARBARA K. JANCA

Chief, Personnel Division (38)

Enclosure

APPENDIX E

FEDERAL PERSONNEL MANUAL

Chapter 315 Subchapter 8 PROBATION

8-4 SEPARATION OF PROBATIONERS

a. For unsatisfactory performance or conduct after appointment.

(1) ....

(2) ....

(3) When separation action is based entirely on deficiencies in performance or conduct after entrance on duty, the probationer is notified in writing why he/she is being terminated and the effective date of the action. The information in the notice on why he/she is being terminated must, at a minimum, consist of the agency's conclusions on the inadaquacies of his/her performance or conduct; it need not require complete and specific reasons as with career or career-conditional employees who have

completed their probationary periods and have competitive status. The employee is not given a right of reply.

(4) ....

(5) The employee should be informed of the specific basis upon which he/she can appeal to the Merit Systems Protection Board (MSPB). See section 8-5 below. Additional notification requirements are contained in MSPB regulations, 5 CFR 1201.21.

b. For conduct before appointment.(1) ....

c. Separation at direction of OPM. ....

d. Timing of separations. In separations under paragraphs a and b above, the employee's separation from the rolls must be effected before the employee has completed his/her probationary or trial period. Otherwise, the procedures applicable to the separation of a career-conditional employee who has completed his/her probationary period are mandatory. To separate an

employee before the completion of the probationary period, an agency must separate him/her before the end of his/her tour of duty on the last day of probation, which is the day before the anniversary date. Because separations are effective at midnight and probationary periods are completed at the end of a tour of duty, it is advisable for an agency that wishes to separate a probationer to separate him/her no later than the day before probation will have been completed. For example:

A probationary period begins on December 1; the tour of duty is from 8 a.m. to 4:30 p.m. Probation normally will be completed at 4:30 p.m. on November 30 of the succeeding year. A separation made effective on November 30 would become effective at midnight -- after the probation has been completed. Therefore, to assure that the separation is made during

the probationary period, it is advisable that it be made effective on or before November 29. When the last work day is a Friday and the anniversary date is the following Monday, the probationer must be separated before the end of his/her tour of duty on Friday, since Friday would be the last day the employee actually has to demonstrate fitness for further employment.

APPENDIX F

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CHICAGO REGIONAL OFFICE

CHARLES L. FEISS, APPELLANT, v.

VETERANS ADMINISTRATION, AGENCY.

DOCKET NUMBER CH315H8710442 DATE: JULY 31, 1987 Charles L Feiss, pro se.

Richard A. Lowell, Esquire, Hines, Illinois for the agency.

BEFORE

Stephen E. Manrose

Administrative Judge

INTRODUCTION

By petition filed on May 2, 1987, as perfected on May 18, 1987, the appellant appealed from an action terminating him effective May 15, 1987 from the position of Computer Programer, GS-5, with the Veterans Administration, Data Processing Center, Hines, Illinois.

I held a hearing on July 16, 1987. The

appeal is dismissed as outside the Board's appellate jurisdiction.

JURISDICTION

Background - The appellant was first appointed to the position of Computer Programer, GS-5, with the VA's Data Processing Center, Hines, Illinois, on December 8, 1985. By notice dated November 21, 1986, he was informed that he would be terminated from his position at the "close of business" on December 5, 1986 because he lacked the necessary skills to perform the duties of his job. By petition dated December 2, 1986, he sought to appeal to the Board from that action, but he withdrew his appeal based on a settlement reached with the agency on December 3, 1986. The parties did not submit a copy of the settlement agreement into the record of the case.

Both parties did enter the settlement agreement into the record of the present appeal. The agreement did not cancel the December 5, 1986 termination action. It instead only provided for the appellant's

reappointment to the same job effective December 7, 1986. The current record, as shown by the testimony of Barbara Janca, Personnel Officer at the Data Processing Center and pertinent personnel documents (Agency Response File: Tabs 3 and 6), establishes that the appellant was in fact terminated on December 5, 1986 and then reappointed to the same job effective December 7, 1986. The settlement agreement also specified that the appellant was required to complete a new one-year probationary period as a Computer Programer beginning on December 7, 1986.

By letter dated May 1, 1986, the appellant was notified that he would be terminated during this second probationary period because he lacked the necessary skills for his position. The appellant filed an appeal from this second termination action, alleging in part that the December 3, 1986 settlement agreement is invalid.

Appeal Rights for Probationary Employees- Probationary employees have no statutory

right of appeal to the Board. Morrison v. Department of Justice, Docket No. AT315H8610266 (MSPB July 2, 1987). There is a regulatory right of appeal in cases where the employee was terminated for post-appointment reasons only if the employee alleges that partisan political reasons or marital status discrimination was the basis for the termination action. See 5 C.F.R. Sec 315.806 (1987); Budnick v. Department of Justice, 2 M.S.P.R. 360 (1979), aff'd 643 F.2d 278 (5th Cir. 1981).

If this appellant was terminated during a probationary period of employment, there would be no appeal right to the Board because he was terminated based on post-appointment reasons and he does not allege that either partisan political reasons or marital status discrimination played a role in the termination action.

Validity of Settlement Agreement - The appellant first argues that the settlement agreement is invalid because he was scheduled to complete his probationary

period on December 5, 1986 and the agency should have disclosed this fact during the settlement negotiations. The appellant also contends that the agency itself breached the settlement agreement by failing to adhere to a clause in the agreement which specified that the terms of the agreement were to remain confidential. In addition, he argues that the agreement was invalid because it improperly provided for his reappointment as a GS-5, step 2.

In challenging the validity of the settlement agreement, the appellant bears a heavy burden because public policy favors settlement agreements in civil actions to avoid unnecessary litigation and to encourage fair and speedy resolution of issues. McKenzie v. Department of the Interior, 23 M.S.P.R. 195 (1984). The party attacking the agreement must show that the agreement was tainted with invalidity, either by fraud practiced upon him or by a mutual mistake of fact. Id. at 198.

The appellant's primary complaint is

that the original termination action was invalid because he completed his original probationary period on December 5, 1986. The parties' agreement on this issue is in accord with applicable law. See Ahmed v. Environmental Protection Agency, 11 M.S.P.R. 548 (1982). Accordingly, assuming that the December 3, 1986 settlement agreement had not been signed prior to the appellant's termination and the appellant had not withdrawn his original appeal to the Board, the termination action would have been reversed on the basis that the appellant had completed his probationary period but had not been provided with the procedural protections specified at 5 U.S.C. Chapter 75. See Johnston v. Small Business Administration, 15 M.S.P.R. 709 (1983).

The evidence reflects, however, that the agency was unaware the December 5, 1985 termination date coincided with the end of the appellant's probationary period. Ms. Barbara K. Janca, Personnel Officer at the Data Processing Center, testified that she

directed the agency's negotiations during the settlement process. She stated that she was unaware that the appellant would have completed his probationary period at the close of business on December 5, 1986. Her testimony is credible for the simple fact that had the agency been aware of this error, it would have been easy to merely set the appellant's termination date one day earlier on December 4, 1986. I therefore find that the agency did not fraudulently conceal a procedural error from the appellant during the settlement negotiations.

The appellant's own intentions in entering into the settlement are more questionable. He appears to have believed that his probationary period would have been completed on December 5, 1986. He argued in his December 2 appeal to the Board that the probationary period had been completed due to his accrual of sufficient annual leave credits to have extended his service to more than one year.

The agency also argues that the appellant's belief that the probationary period would be completed on December 5 is shown by the following statement in his June 3, 1987 letter to the Board: "If appellant had called the attention of the agency to the impending end of the probationary period, instead of entering into the settlement agreement, it would have been a simple matter for the agency to move up the effective date of termination by one day." The appellant responds that this statement does not show that at the time the appellant entered into the settlement negotiations he was aware of the end of his probationary period.

This evidence shows that the agency was unaware that the appellant's probationary period would have been completed on December 5, 1986. The appellant's June 3 statement does not necessarily show that he was aware prior to his termination of the pertinent case law which establishes that his probationary period would end on December 5,

1986. Even assuming that the June 3 statement is disregarded, however, the appellant argued before the Board in his December 2, 1986 appeal letter that he was not a probationary employee. Accordingly, the record reflects that before he signed the settlement agreement he believed that his probationary period would end before the date of his termination.

When the appellant signed the settlement agreement he necessarily precluded review of the issues raised in his appeal including his contention that he had completed his probationary period. This shows nothing more than the appellant's desire to reach a compromise which would permit him to retain his job and avoid any uncertainty that litigation of the matter would bring. The fact that he may have ultimately succeeded in his appeal had the matter not settled does not taint the settlement agreement because many settlement negotiations resolve disputes in which one party may ultimately prevail in the ensuing litigation.

The parties's different beliefs concerning the end of the appellant's probationary period indicates that they were not acting on a mutual mistake of fact which tainted the settlement agreement. Even had the parties both wrongfully believed that December 5 constituted a correct date of termination, the terms of the settlement agreement itself were not based on a mutual mistake of fact. The terms of the agreement were clearly set forth and understood by the parties. They were willingly agreed on to avoid further litigation. The appellant has not shown that they were based on a mutual mistake of fact. See Townsel v. Tennessee Valley Authority, 33 M.S.P.R. 456 (1987).

The appellant's complaint concerning the alleged disclosure of confidential information centers on his testimony that following his December 7, 1986 reappointment as a Computer Programer his supervisor notified another employee who was charged with reviewing the appellant's work that the appellant was a probationary employee who

needed close supervision. The appellant further stated the agency knew when it entered into the settlement agreement that it would be impossible to conceal the terms of the settlement agreement. Ms. Janca testified that the confidentiality clause in the settlement agreement was not breached because the agency only pledged to keep the issues of the appellant's case, including the fact of the appellant'a termination and the issues he raised in an EEO complaint, confidential.

The "confidentiality clause" of the settlement agreement reads as follows: "This agreement shall be kept confidential and the terms herein shall not be disclosed by either party, except to authorized EEO officials or other officials responsible for implementing the agreement." There is no evidence in this record which indicates that the agency breached this clause. The fact that a supervisory official informed another employee who would be reviewing the appellant's work that the appellant was a

probationary employee was a statement of fact which did not serve to disclose the terms of the agreement. Moreover, the agency presumably hoped that the appellant's performance would improve in a second probationary period. To this extent, it could be reasonable to disclose the appellant's probationary status to an employee who would review the appellant's work. Such a disclosure was to a person who was in part responsible for implementing the settlement agreement insofar as that phrase implies that the agreement was executed for the purpose of giving the appellant a second chance to succeed as a Computer Programer. The appellant's contention to the contrary is meritless and does not constitute a basis for overturning the settlement agreement.

The appellant's allegation that the settlement agreement improperly provided him with a GS-5, step 2, upon reappointment is based on his contention that his advancement from GS-5, step 1, to GS-5, step 2, constitutes an admission that he was

performing at a satisfactory level at the time of his termination. Ms. Janca stated that the agency agreed to give the appellant a GS-5, step 2, only for the purpose of giving him credit for the time spent as a step 1 and not as a merit within-grade step increase.

The appellant has not cited any law, rule, or regulation in support of his contention that he was improperly given a step increase as a part of the settlement agreement and I find none. The agency provided this concession as a part of the consideration given to the appellant to encourage him to enter into the agreement. In return, the agency believed that it had settled all pending complaints and appeals concerning the termination action. This exchange constituted valid consideration for the settlement. There is no basis for the appellant's contention that the consideration provided him invalidates the settlement agreement. Accordingly, his argument in this respect is not meritorious

and does not constitute a basis for overturning the agreement.

In short, I find that the agreement is valid and should be upheld. It provides that the appellant was in a probationary period of employment when he was terminated on May 15, 1987. Because he does not allege either partisan political reasons or marital status discrimination as a basis for the termination action, I find that the Board lacks jurisdiction over his appeal. See Budnick v. Department of Justice, supra.

DECISION

The appeal is dismissed.

This initial decision will become a final decision of the Merit Systems Protection Board on Sep 04, 1987 unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. Secs 1201.113, .117 (1987).

ADMINISTRATIVE AND JUDICIAL REVIEW

Any party to this appeal, the Director of the Office of Personnel Management, and

the Special Counsel may seek to have this decision reviewed by the Board by filing a petition for review with:

Office of the Clerk
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. Sec 1201.114 (1987) of the Board's regulations. The petition for review must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record. The parties are required to serve any petition for review and any subsequent pleadings on all other parties. (It is not necessary to serve the regional office.)

Pursduant to 5 U.S.C. Sec 7703 the appellant may obtain judicial review of the Board's final decision on this appeal, if the court has jurisdiction, by filing a petition with:

The United States Court of Appeals
for the Federal Circuit

717 Madison Place, N.W.

Washington, D.C. 20439

Such a petition must be received by the court no later than thirty (30) days from the date the Board's decision becomes final.

FOR THE BOARD: Stephen E. Manrose

Administrative Judge

APPENDIX G

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CHARLES L. FEISS. Appellant, v.

VETERANS ADMINISTRATION, Agency.

DOCKET NUMBER CH315H8710442 DATE NOV 27, 1987 Charles L. Feiss, Niles, Illinois, pro se. Richard A. Lowell, Esquire, Hines, Illinois, for the agency.

BEFORE

Daniel R. Levinson, Chairman

Maria L. Johnson, Vice Chairman

Dennis M. Devaney, Member

ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on July 31, 1987, because it does not meet the criteria for review set forth at 5 C.F.R. Sec 1201.115.* This is the Board's final order

in this appeal. The initial decision in this appeal is now final. 5 C.F.R. Sec 1201.113(b).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. Sec 7703. The address of the court is 717 Madison Place, N.W., Washingtion, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD: Robert E. Taylor

Washington, D.C. Clerk of the Board

* On October 1, 1987, the Board received a request from the appellant to subpoena the agency for copies of an investigative file (compiled in connection with his Equal Employment Opportunity Complaint) and of an insurance-related document allegedly missing from the appellant's copy of his Official Personnel File. The request is denied, as it is untimely at this stage of the proceedings, and the appellant has not shown that the requested information is new and

material to the issues under consideration in this appeal. 5 C.F.R. Sec 1201.114(i).

APPENDIX H

FEDERAL PERSONNEL MANUAL

Subchapter 8 Probation

8-2. APPLICABILITY AND LENGTH OF PROBATIONARY PERIOD

a. Career and career-conditional or career appointment by selection from a certificate of eligibles is required to serve a probationary period of one year. This applies not only to the first appointment of this kind, but to any subsequent career or career-conditional appointment by selection from a certificate of eligibles, regardless of whether the appointee had previously completed a probationary period. (If an agency selects an employee from a certificate of eligibles, but appoints him/her noncompetively by reinstatement, transfer, or position change, the agency follows the instructions on probation in

paragraph b or e below, as appropriate.)

b. Reinstatements.(1) Upon reinstatement to serve as a career or career-conditional employee, an employee is required to serve a new probationary period of one year beginning on the date of reinstatement unless, during any period of service which affords a current basis for reinstatement, he/she either completed a probationary or served with competitive status under an appointment which did not require service of a probationary period.

e. Position changes and transfers. The promotion, demotion, reassignment, or transfer of a career or career-conditional employee before he/she has completed probation is subject to satisfactory completion of the probationary period in the new position. The employee does not have to serve a new probationary period after position change or transfer, regardless of a

change in his/her line of work.

f. Credit for prior service. Prior service, including the maximum amount of time on the rolls in a nonpay status, which is credited toward completion of the probationary period is given in appendix A to this chapter.

APPENDIX A Determining Completion of a Probationary Period

The date of the beginning of a probationary period is normally the effective date of the personnel action in connection with which the probationary period is required. However, in certain cases, explained in paragraph c of section A-3, service before this personnel action may be counted toward completion of the probationary period.

A-3. COUNTING SERVICE TOWARD COMPLETION OF PROBATIONARY PERIOD

a. Periods of absence. (1) Absence on leave

with pay. .....

(2) Absence in a nonpay status. .....

(3) Absence following separation, suspension, or furlough.

b. Periods of absence due to military service or compensable injury. ....

c. Service prior to personnel action involving new probationary period.

(1) When service is counted. All actual prior service which meets the requirements listed below is counted toward the completion of a new probationary period in connection with:

--career-conditional or career appointments from civil service register; and

--the conversions to career-conditional or career employment from other types of employment which are covered by subchapter 7.

Prior service is counted regardless of whether it was under competitive appointment (career-conditional, career, probational, permanent, war service indefinite, indefinite, limited, or unlimited temporary), under excepted appointment, or as status quo employees. However, service of employees whose positions in public or private enterprise are taken over by the Government is counted only from the date the positions are placed in the competitive service. Prior service which meets all of the following specifications is counted:

(a) It was rendered immediately preceding career or career-conditional appointment or conversion. Employees must have been on the rolls of the agency at the time of the career or career-conditional appointment or conversion.

(b) It was in the same agency and, except for conversion of a disabled veteran from a temporary appointment under the provisions of section 7-8 of this chapter, was in the same line of work as the position for which the action is taken. All service to be counted must have been continuously in the same line of work; there must have been no interruption by official position change to another line of work. (The same line of work requirement does not apply to conversion of a disabled veteran to career or career-conditional appointment under section 7-8 of this chapter.)

(c) No more than one break of less than 30 days has occurred in it. (While actual service preceding a break of less than 30 days may be counted, the period of

separation from the service may not be counted.) Military service is a continuation and not a break in service when a veteran who left a civilian position to enter the military service is restored to civilian service in accordance with his restoration rights.

A-4 ACTION ON COMPLETION OF PROBATIONARY PERIOD

An employee serving a probationary period acquires a competitive status automatically when he or she completes his/her probationary period. A probationary period is automatically completed when the employee is still on the rolls and has met the service requirement.